

APPLYING THE ARMS TRADE TREATY TO ENSURE THE PROTECTION OF HUMAN RIGHTS

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cover picture: Men walk past damaged buildings as they head to inspect their homes in the Wadi Al-Sayeh district at the al-Khalidiyeh area in Homs May 14, 2014. The fall of Syria's third largest city to government forces is a major blow to the opposition and a boost for Assad, weeks before his likely re-election. Picture taken May 14, 2014.

Credit: REUTERS/Omar Sanadiki

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INTRODUCTION

On 2 April 2013, after many years of discussions and negotiations, the United Nations (UN) General Assembly adopted the Arms Trade Treaty (ATT) by an overwhelming majority. On 24 December 2014, ninety days following the date of the deposit of the fiftieth instrument of ratification of the Treaty, the ATT entered into force.

The ATT is the first treaty setting global standards to govern the international trade in conventional arms and munitions. As such, the ATT is an important step forward. At its core, the ATT represents a shift by the international community towards addressing one of the structural conditions that make crimes under international law and serious violations and abuses of human rights possible – the poorly regulated and illicit supply of arms. In seeking to regulate the conditions that allow such violations and abuses to occur the ATT is a preventive treaty. The overwhelming support for the ATT in the UN General Assembly – with 156 States voting to adopt the treaty – is indicative of this wider focus on preventive approaches to armed conflict and human rights violations.

The ATT provides a regulatory mechanism that places various duties upon States to control and assess whether their arms exports and transfers might be used to carry out crimes under international law or serious human rights violations. The legality of an arms transfer is now explicitly linked to human rights and international humanitarian law (IHL) rules. These standards, if properly implemented, will stop a wide range of arms flows when the transferring State has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, war crimes or if there is an overriding risk that an export could facilitate a serious violation of international human rights law or international humanitarian law.

For the ATT to be a successful and meaningful treaty these standards need to be applied in a consistent and rigorous way. The purpose of this document is to assist States in implementing the ATT to ensure the human rights protections contained in Article 7 are strictly applied. It proposes a methodology for assessing the risk of a proposed export being used to commit or facilitate serious violations of international human rights law and sets out a number of elements to consider when forming a judgment as to when there is an overriding risk that such violations could occur.

OVERVIEW OF THE TREATY

Article 1 states the objective and the purpose of the treaty.

ARTICLE 1: OBJECT AND PURPOSE

The object of this treaty is to:

- Establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms;
- Prevent and eradicate the illicit trade in conventional arms and prevent their diversion;

For the purpose of:

- Contributing to international and regional peace, security and stability;
- Reducing human suffering;
- Promoting cooperation, transparency and responsible action by States Parties in the international trade in conventional arms, thereby building confidence among States Parties.

The object and purpose of any treaty is the interpretative lens that guides the implementation of the obligations that follow in the treaty. As Article 1 makes clear, there are principles that should guide States' actions in implementing their treaty obligations. These include:

- National control systems and arms transfer decisions should conform to the highest possible common international standards and contribute to international peace and security;
- The primary purpose of arms transfer prohibitions and export risk assessment is to reduce human suffering;
- All activities of States in the transfer and control of conventional arms should reflect responsible action.

States Parties are required to establish and maintain an effective and transparent national control system to regulate the transfer, at a minimum, of certain types of arms and related items,¹ and shall implement the treaty in a consistent, and non-discriminatory manner, bearing in mind the principles referred to in the treaty.²

The ATT addresses the activities of the international trade comprising the export, import, transit, trans-shipment and brokering of the seven major conventional weapons defined under the UN Register of Conventional Arms as well as small arms and light weapons (Article 2.1).³

States Parties are required to regulate the export of the types of arms in Article 2.1 as well as munitions and ammunition "fired, launched or delivered" by these types of arms.⁴ States are also required to regulate the export of parts and components "in a form that provides the capability to assemble" those arms.⁵

A State's national control system must include a national control list, a system for detailed export authorizations prior to export, and designated competent national authorities to regulate the transfer of conventional arms, ammunition/munitions and parts and components.⁶

States Parties are prohibited under Article 6 of the treaty from authorizing any transfer (including export, import, transit, trans-shipment and brokering) of conventional arms and related ammunition/munitions and parts and components that would violate UN Security Council Chapter VII measures (including arms embargoes), or a State Party's existing relevant treaty obligations (such as a

prohibition on the transfer of landmines under the Landmines Convention). In addition, transfers are prohibited where a State has knowledge that the arms being considered for authorization would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or any other war crime as defined by international agreements to which the State is a party.

The ATT requires States Parties to conduct an assessment of whether an export of conventional arms or related ammunition/munitions and parts and components “would” undermine or contribute to peace and security.⁷ A State is then required to assess the potential that these arms or related items “could” be used to commit or facilitate a serious violation of international human rights law or of international humanitarian law, or an act constituting an offence under the exporting state’s international conventions and protocols relating to terrorism or to transnational organised crime.⁸ Exporting States Parties must also take into account the risk of the arms or related items being used to “commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children”,⁹ which also constitute serious violations of international human rights law or international humanitarian law.

Exporting States Parties must assess the risk of diversion of the conventional arms covered by the treaty (but are not specifically required to also assess the risk of diversion of munitions/ammunition or parts and components).¹⁰ Measures to mitigate risk of any of the negative consequences outlined above are to be considered by the exporter. When it is determined that there is an overriding risk of the negative consequences, then no export authorization can be given.¹¹

States Parties must ensure that all authorizations are detailed and issued prior to the export, and should reassess the authorization if new relevant information becomes available.¹² States must maintain national records on export authorizations or actual exports and also submit annual reports on their export and import authorizations or actual deliveries of the conventional weapons covered by the treaty.¹³ A voluntary trust fund will be established to aid States to implement the terms of the Treaty.¹⁴

States Parties will meet in the Conference of States Parties (the first time no later than one year following the entry into force of the Treaty and thereafter at such other times as may be decided by the Conference) to review the progress of treaty implementation, consider developments in the field of conventional arms and consider recommendations and amendments.¹⁵ In 2020 and thereafter every three years States Parties can consider amending the Treaty provisions by consensus or, as a last resort, with a three-quarters majority vote of the States Parties present and voting at the meeting.¹⁶ States Parties are required to settle disputes through negotiation, mediation, conciliation, judicial settlement or other peaceful means. Arbitration, by mutual consent, is also encouraged.¹⁷

ARTICLE 7

The underlying premise of the ATT is that in order to achieve a more effective and responsible regulation of the international arms trade, all international transfers of conventional arms must be carried out in a manner that respects States’ international obligations.¹⁸ These obligations include the UN Charter, international humanitarian law, international human rights law and existing obligations under treaties related to organised crime, and terrorist acts. Article 7 of the ATT captures this obligation as it applies to an exporting State Party.

ARTICLE 7: EXPORT AND EXPORT ASSESSMENT

1. If the export is not prohibited under Article 6, each exporting State Party, prior to authorization of the export of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, under its jurisdiction and pursuant to its national control system, shall, in an objective and non-discriminatory manner, taking into account relevant factors, including information provided by the importing State in accordance with Article 8 (1), assess the potential that the conventional arms or items:

- a) would contribute to or undermine peace and security;

b) could be used to:

- commit or facilitate a serious violation of international humanitarian law;
- commit or facilitate a serious violation of international human rights law;
- commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a Party; or
- commit or facilitate an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting State is a Party.

2. The exporting State Party shall also consider whether there are measures that could be undertaken to mitigate risks identified in (a) or (b) in paragraph 1, such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States.

3. If, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences in paragraph 1, the exporting State Party shall not authorize the export.

4. The exporting State Party, in making this assessment, shall take into account the risk of the conventional arms covered under Article 2 (1) or of the items covered under Article 3 or Article 4 being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children.

5. Each exporting State Party shall take measures to ensure that all authorizations for the export of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4 are detailed and issued prior to the export.

6. Each exporting State Party shall make available appropriate information about the authorization in question, upon request, to the importing State Party and to the transit or trans-shipment States Parties, subject to its national laws, practices or policies.

7. If, after an authorization has been granted, an exporting State Party becomes aware of new relevant information, it is encouraged to reassess the authorization after consultations, if appropriate, with the importing State.

ARTICLE 7: EXPORT RISK ASSESSMENT

Article 7 of the ATT forms the heart of the treaty in establishing the international standards for the procedures that States Parties must undertake when assessing an export of conventional arms or related ammunition/munitions and parts and components. Included in this assessment are the risks of a serious violation of international human rights law or a serious violation of international humanitarian law associated with a potential export.

Article 7 sets out the steps a State Party must complete prior to authorising or denying an export authorization of conventional arms and related items. These steps are:

- An assessment of a range of risks, including risks of a serious violation of international human rights law (Article 7(1)(b)(ii));
- A consideration of mitigation measures that could address any existing risks (Article 7(2));
- Making a decision based on whether there is an “overriding risk” of negative consequences (Article 7(3)).

STEP 1: AN ASSESSMENT OF RISKS

Once a State Party determines that the transfer is not prohibited under Article 6, States Parties are required to conduct an objective and non-discriminatory assessment of the potential that an export of conventional arms or related items “would” undermine peace and security rather than contribute to peace and security.¹⁹

States Parties are also required to assess the potential that the arms or related items “could” be used to commit or facilitate a serious violation of international human rights law or of international humanitarian law, or an act constituting an offence under the exporting state’s international conventions and protocols relating to terrorism or to transnational organised crime.²⁰

By requiring all States Parties to undertake an objective and non-discriminatory assessment of a range of potential risks, the ATT is instilling a due diligence standard. At the heart of due diligence lies the principle that an investigative process must be undertaken with the objective of assessing and preventing possible harm. Due diligence is the main tool for risk control and is one that requires States to take positive steps to carry out its obligations under international law.

“OBJECTIVE AND NON DISCRIMINATORY”

The ATT contains a general obligation for all States Parties to “implement this Treaty in a consistent, objective and non-discriminatory manner, bearing in mind the principles referred to in this Treaty”.²¹ This obligation applies to all articles in the treaty, including Article 6, and also applies to the assessment process in Article 7 and forms part of the general due diligence requirement on States. In order to ensure fairness and objectivity the following factors should apply to the assessment process:

- The assessment process should apply to each export of arms and/or related items and to all countries, without distinction;
- There should be a consistent assessment of each application for an arms export authorization to fully meet the criteria;
- Objective, verifiable and detailed information from credible and reliable sources on the arms and/or related items, the intended recipients, the likely uses, the route and all those involved in the export should be used;
- Up-to-date information on international human rights and international humanitarian law standards and on the incidence and nature of relevant violations should be used to ensure proper assessments are made;
- Complete and accurate documentation should be a regular component of all assessment processes to enhance the standardization of the decision making process.

SOURCES OF INFORMATION:

A variety of credible, reliable and verifiable information sources exist that are relevant to making assessments. These should be consulted to assist States in their export decision-making process. Such information sources include:

- Documentation from the UN human rights bodies, the International Committee of the Red Cross (ICRC) and other international and regional bodies;
- Diplomatic missions in the recipient State;
- Human rights reports by States, including domestic human rights commissions reports;

- Research by academic, research and policy institutes on arms transfers and human rights issues;
- Information in the report and the annex of the UN Secretary-General annual report on conflict-related sexual violence;
- The UN Secretary-General's reports on children and armed conflict;
- Reports of the Special Representative of the Secretary-General for Children and Armed Conflict;
- Information from the Office of the Special Representative on Sexual Violence in Conflict including the early warning matrix for sexual violence;
- The UN Secretary General's World Report on Violence Against Children;
- Data and information related to national implementation of Security Council Resolutions 1325 (2000) and 1820 (2008) and other related resolutions, including NGO reports;
- Human rights reports by States and reports by NGOs under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), the UN Convention against Torture (UNCAT) and other human rights treaties and recommendations from treaty monitoring bodies;
- Reports from credible international human rights NGOs;
- Reports from reliable local sources including local NGOs;
- Reliable media reports.

WOULD THE POTENTIAL EXPORT “CONTRIBUTE TO OR UNDERMINE PEACE AND SECURITY”?

Article 7 of the ATT contains a number of elements that address the fact that reaching a decision about conventional arms exports can sometimes be extremely difficult because of the various risks to be considered. Part of this difficulty is reflected in the recognition that arms exports have the potential to either contribute to or undermine international peace and security. Article 7(1)(a) of the ATT requires States Parties to assess the potential that the items under review “would contribute to or undermine peace and security”.

Firstly, conventional arms and related items cannot contribute to peace and security if they are used to violate relevant international law referred to in the principles set out in the Preamble of the treaty and international legal obligations reflected in Article 6. Secondly, a State requires certain types of conventional arms and related items to exercise the lawful use of force consistent with international standards on law enforcement²² in order to protect and safeguard all persons and institutions under its jurisdiction. The UN Charter also recognizes that UN Member States, in their international relations, have an inherent right to collective or individual self-defence and thus acquiring certain conventional arms and related items is key in exercising that right.²³ The use of physical force by UN peacekeepers is also lawful when it is in self-defence and in the implementation of a UN peacekeeping mandate. In these ways, the acquisition of conventional arms to use in a manner consistent with a State's international legal obligations, including international human rights law and international standards on law enforcement, can contribute to peace and security. It should also be noted that the treaty refers in particular to international peace and security and national security considerations as such are not mentioned in the treaty.²⁴

Moreover, the use of the word “would” in Article 7.1(a) suggests demonstrating a higher level of

probability of either a negative or a positive contribution to peace and security than “could” (as used in Article 7(1)(b)). In making such an assessment States Parties should consider a number of crucial factors including:

- Is the recipient State currently involved in an international or non-international conflict?
- Is the recipient state under preliminary examination by the Office of the Prosecutor of the International Criminal Court?
- Is the export lawful under international law (for example, if the end-user is a non-state actor, is the use of the arms or related items legal? Has the non-state actor made a formal commitment to apply international humanitarian law and international human rights law, integrate it into their training and doctrine and maintain effective accountability mechanisms for non-compliance?)
- Is the proposed export assisting a State’s law enforcement agencies to maintain or re-establish effective security for its population through the lawful use of force that is consistent with international standards and in particular to prevent violence?
- Would the proposed export provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination and its neighbors?
- Is the proposed export compatible with the technical and economic capacity of the recipient country and its military, security and police forces?
- Are there other potential negative impacts from the proposed export beyond the ones included in Article 7(1)(b), for example that would involve the risk of criminal acts?
- Would the proposed export contribute to a destabilizing and excessive accumulation of arms – for example, would the proposed export affect the regional balance of forces and the situation in the region?²⁵

COULD THE ITEMS BE USED TO COMMIT OR FACILITATE A SERIOUS VIOLATION OF INTERNATIONAL HUMAN RIGHTS LAW?

INTERNATIONAL HUMAN RIGHTS LAW

International human rights law is the body of international law designed to promote and protect human rights at the international, regional and domestic level. Every UN Member State is a party to one or more of the universal human rights treaties (See appendix A). These treaty standards provide the benchmark for assessing a potential export of conventional arms against the ATT’s human rights criterion.

Conventional arms could be used to commit or facilitate serious violations of one or more of a spectrum of inter-related human rights defined in international law. Some of these human rights, such as the prohibition of torture, have attained the status of “customary international law” binding on all States regardless of whether they are parties to a particular treaty.

A “SERIOUS VIOLATION” OF INTERNATIONAL HUMAN RIGHTS LAW

There is no widely accepted definition or catalogue of what constitutes a “serious violation” of international human rights law. However, the inclusion of “serious violations” within the text of the ATT text acknowledges that, while all human rights violations are unlawful, only those of greatest concern to the international community will engage the special treaty machinery of the ATT.

There is also no universally agreed methodology for deciding whether particular acts can be characterized as a “serious violation of international human rights” – though the term is widely used by UN bodies, the Human Rights Council and the UN treaty bodies. For the purposes of the ATT, “serious violations” should be assessed against one or both of the following criteria:

Nature of the right violated and the harm suffered: Exporting States should be required to consider a possible serious violation of any human right, be it civil, cultural, economic, political and social.²⁶ The severity of the impact on the affected individual or individuals should also play a role in determining whether the ATT provisions apply to the export.

For example, there are certain types of human rights violation that should be considered “serious” by reason of the nature of the harm suffered by the individual whose rights were violated. These include:

- unlawfully depriving a person of his or her life;
- subjecting the person to torture or other cruel, inhuman or degrading treatment or punishment or to enforced disappearance;
- excessive or unnecessary use of force in violation of human rights;
- imprisoning a person for his or her beliefs;
- systemic discrimination;
- subjecting people to slavery-like practices or forced labour;
- systematically destroying homes or sources of food.

The scale or pervasiveness of the violations: A singular violation of human rights using conventional arms or munitions could be so severe and grave in its impact as to pose a very significant risk if further arms and munitions are exported. However, the gravity is more usually manifest in a recurring and foreseeable pattern of violations, or in the institutional nature of violations that are condoned by the authorities. Relevant questions to ask would include:

- Is there reliable and credible information that indicates/demonstrates a pattern of such violations or abuse?
- Are the violations persistent or affecting many people?
- Are the violations in question occurring on a widespread or systematic basis?
- Is there a state of impunity with regard to those suspected of criminal responsibility for such violations?

SOME EXAMPLES OF “SERIOUS VIOLATIONS” OF INTERNATIONAL HUMAN RIGHTS LAW IN THE CONTEXT OF THE ATT:

- All forms of gender-based violence, for example, rape and other forms of sexual violence;
- Excessive use of force by police and security forces against demonstrators;
- Violations to the right to life, including murder and extrajudicial and summary executions;
- Large scale demolition of houses;
- Subjecting a person to torture or other cruel, inhuman or degrading treatment;
- Enforced disappearances;
- Arbitrary or prolonged detention;
- Enslavement;
- Deliberate armed attacks on medical personnel and facilities, or on educational establishments and

students, or on refugee or internally displaced persons (IDP) camps;

- Systemic discrimination on the grounds of age, gender, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin or other grounds that are universally recognized as impermissible under international law;
- Forcible transfer of a population;
- Forcible evictions and destruction of housing and property;
- Detention in degrading conditions;
- Arbitrary arrest;
- Extermination, persecution, and the crime of apartheid as defined in the Rome Statute of the International Criminal Court.

RELATIONSHIP BETWEEN INTERNATIONAL HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW DURING ARMED CONFLICT

States, when considering the authorization of an export of conventional arms, must also consider the risk the arms will be used to commit or facilitate a serious violation of international humanitarian law (IHL).²⁷

During armed conflict, States have specific obligations under IHL, including a general obligation to “respect and ensure respect” for the rules of IHL.²⁸ IHL is intended, among other things, to protect civilians and those who are not taking part in hostilities (i.e. wounded, sick and captured combatants) and it regulates the conduct of armed conflict. Serious violations of IHL include the “grave breaches” identified in the four 1949 Geneva Conventions and Additional Protocol I, which are applicable in international armed conflict.

International human rights law also applies during times of armed conflict and is not displaced by the application of IHL. The two bodies of law operate concurrently and at times human rights law can be directly applied in situations of armed conflict.²⁹ The International Court of Justice has affirmed that all human rights law - civil, political economic, social and cultural rights - continues to apply in situations to which IHL is applicable.³⁰ The Human Rights Committee has also affirmed that in situations of armed conflict, “both spheres of law are complementary, not mutually exclusive”.³¹

Decisions concerning an export of conventional arms, particularly to States involved in armed conflict, must therefore include not only consideration of the risks for a violation of IHL but must also consider whether there is a risk that a transfer will be used to commit or facilitate a serious violation of international human rights law.

GENDER-BASED VIOLENCE, VIOLENCE AGAINST WOMEN, AND VIOLENCE AGAINST CHILDREN

INTERNATIONAL LEGAL STANDARDS

All of the numerous international legal conventions related to international human rights are grounded in the concepts of non-discrimination, equality and recognition of the dignity of each and every individual. In addition to human rights instruments protecting all individuals, women and girls are entitled to the rights contained in treaties that provide specific forms of human rights protection.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)³² is the main international treaty focused on women's human rights. It provides a definition of discrimination against women, identifies several forms of such discrimination, and establishes the norms and standards to prevent and eliminate all forms of discrimination against women (due diligence standard), protect and promote women's human rights and ensure substantive gender equality, as part of States' human rights obligations.

The CEDAW does not include an explicit reference to violence against women or gender-based violence. However, progressive interpretations on the content of CEDAW have recognized such violence as a violation of human rights. General Recommendation 19 of the CEDAW Committee of 1992 interpreted the term "discrimination" in Article 1 of the Convention to include gender-based violence on the basis that it is "violence that is disproportionately directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence."³³

The CEDAW Committee of 1992 also stated in General Recommendation 19³⁴ that:

"7. Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include:

- The right to life;
- The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;
- The right to equal protection according to humanitarian norms in time of international or internal armed conflict;
- The right to liberty and security of person; (...)"

The Vienna Declaration and Programme of Action adopted by the 1993 World Conference on Human Rights recognized gender-based violence and violence against women as a human rights violation and called for the appointment of a Special Rapporteur on violence against women.³⁵

The 1993 Declaration on the Elimination of Violence against Women adopted by the UN General Assembly is the first consensus document at international level to explicitly addressing violence against women and defining a due diligence standard at national and international level. It defines "violence against women" as any "act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."³⁶

The 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence is the second legally binding, regional instrument on violence against women and girls. Unlike other regional agreements, it can be signed and ratified by any State. It recognises violence against women as a violation of human rights and a form of discrimination against women, and defines “gender-based violence against women” as “violence that is directed against a woman because she is a woman or that affects women disproportionately”.³⁷

In 2013, at the 57th Session of the Commission on the Status of Women (CSW57) Member States adopted by consensus Agreed Conclusions on the elimination and prevention of all forms of violence against women and girls. This represents a historic outcome, as there had been no agreed conclusions on this issue when it was last considered by CSW in 2003. Gender-based violence was defined by the CSW57 as “a form of discrimination that seriously violates and impairs or nullifies the enjoyment by women and girls of all human rights and fundamental freedoms.”³⁸

Member States also agreed by consensus at the CSW57 that violence against women “means any act of gender-based violence that results in, or is likely to result in, physical, sexual, psychological harm or suffering to women and girls, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”³⁹

The United Nations Security Council has also passed several resolutions on addressing sexual violence in conflict and post-conflict.⁴⁰

The Convention on the Rights of the Child (CRC)⁴¹ sets up the legal framework of standards which should govern all law, policy and practice affecting children. These include the promotion of prevention of violence, and responses to protect all children from all forms of violence. For example:

- In Article 38 States parties undertake to respect and to ensure respect for the rules of international humanitarian law applicable to them in relation to children and armed conflicts, recalling the obligations laid down in the Geneva Conventions.
- Article 37 declares that no child shall be subjected to “torture or other cruel, inhuman or degrading treatment or punishment”.
- Article 35 entrenches the child’s right to protection from abduction, sale and trafficking.

Article 1 of the Convention on the Rights of the Child states that a child is: “[e]very human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier”. The definition of violence is in Article 19 of the Convention: “all forms of physical or mental violence, injury and abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.”

The CRC is supplemented by two Optional Protocols, both adopted in 2000, which provide more detailed protection for children from particular forms of violence. The most relevant to the ATT is the Optional Protocol to the CRC on the involvement of children in armed conflict.⁴² This sets the minimum age for compulsory recruitment or direct participation in hostilities at 18 years. It also categorically prohibits armed groups from recruiting or using in hostilities anyone under 18 years of age.

APPLYING ARTICLE 7(4) OF THE ATT

In considering the risks of serious violations of international human rights law, Article 7(4) requires the exporting State Party to take into account the risk of the conventional arms “being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children”.

The inclusion in the ATT of assessing the risks of “serious acts of gender-based violence” (GBV) and “serious acts of violence against women and children” is an important step forward in formalizing the links between gender-based violence and the international arms trade. This inclusion is

consistent with the broader UN practice of mainstreaming gender issues by paying attention to differing impacts on women and men in all frameworks, policies and programmes,⁴³ and indeed, with international human rights treaties which include an article emphasizing the requirement for men and women to have equal access to human rights.⁴⁴ Article 7(4) of the ATT is demonstrative of this mainstreaming approach requiring States Parties to ensure they have conducted a gender analysis in their assessment of the risks of international human rights law violations in Article 7(1).

Article 7(4) of the ATT states:

“The exporting State Party, in making this assessment, shall take into account the risk of the conventional arms covered under Article 2(1) or of the items covered under Article 3 or Article 4 being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children.”

“Serious acts of gender-based violence” and “serious acts of violence against women and children” are serious violations of international human rights law when committed by state agents or by persons acting with the authorization, support or acquiescence of the State or when the State fails to act with due diligence to prevent violence by non-state actors and/or fails to effectively investigate and prosecute cases and provide reparations to victims. Moreover, in some cases, serious acts of gender-based violence, violence against women or violence against children can amount to a war crime, a crime against humanity or a constituent act of genocide. Any evaluation of whether a potential export could be used to commit or facilitate a serious violation of international human rights law or IHL must include assessing serious violations of the rights of children and the rights of women.⁴⁵

COULD A SERIOUS VIOLATION OF INTERNATIONAL HUMAN RIGHTS OCCUR?

To assist licensing authorities and other government officials involved in the arms export decision-making process, a clear and consistent procedure for determining whether there is a risk of a serious violation of human rights is required. The following steps are recommended:

- (1) An assessment of the recipient state's respect for international human rights law;
- (2) A more specific assessment of the nature of the equipment, its stated end-use and the stated end-user, as well as the transport route, those involved in the transfer and the risks of diversion.

1. RECIPIENT STATE'S RESPECT FOR INTERNATIONAL HUMAN RIGHTS LAW

A thorough assessment of the risk that an export of conventional arms could be used to commit or facilitate a serious violation of international human rights law should start with an inquiry into the recipient State's overall conduct in relation to its human rights obligations. Such an assessment is important because determining whether the possible risks of the export being used to commit or facilitate one or more serious violations of human rights cannot be done without considering the broader context, including the recipient State's general respect for human rights.

The following – non-exhaustive – indicators can assist in assessing a recipient state's attitude towards respecting and promoting its obligations under international human rights law:

- Has the recipient country become a state party to the key human rights instruments (e.g. the ICCPR, ICESCR, UNCAT, CEDAW, the Convention for the Protection of All Persons from Enforced Disappearance (CPED), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the regional human rights treaties, etc.) without having made any reservation to them and implemented them into national law?
- Has the country ratified or acceded to the Rome Statute of the International Criminal Court and implemented it into national law?
- Are there laws, policies and implementation mechanisms designed to prevent violations of international human rights? Are these laws implemented?
- How does the criminal justice system respond to reported cases of gender-based violence?
- What steps is the recipient State taking to implement UN Security Council Resolution 1325 on Women, Peace and Security and subsequent resolutions 1820, 1888, 1889, 1960 and 2016?
- Does the recipient State have legislation and procedures in place to allow for investigations into human rights abuses and violations committed by state or non-state actors on any territory subject to its jurisdiction?
- Is there an ordinary civilian, independent, impartial and functioning judicial system in the recipient country, capable of investigating and prosecuting serious human rights violations?
- Does the recipient State educate and train key sectors such as its security forces and police officers (and other arms bearers) in the content and application of international human rights and humanitarian law?
- Are there independent monitoring bodies and national institutions for the promotion and protection of human rights?

- Is there a record of impunity for human rights or IHL violations?
- Has the recipient state agreed to independent monitoring and investigations into alleged serious international humanitarian law and serious violations of human rights and abuses? If so, how has it addressed the outcome (i.e. has it implemented any recommendations?)
- Are crimes under international law properly defined in national legislation?
- Is there an effective, independent and impartial complaint mechanism capable of investigating and prosecuting cases of allegations against law enforcement officials?
- Is there an effective, independent and impartial prison monitoring system?
- Is there a standard procedure for the use of force and firearms by the police and other law enforcement agencies? Are those standard procedures effectively complied with?

2. ASSESSING THE NATURE OF THE CONVENTIONAL ARMS AND ITS END USE/ END-USER

The objective of this assessment is to determine whether there have been previous serious violations or abuses of human rights using conventional arms and related items. It is also to assess the risk that that such violations are likely to be facilitated or committed by the transfer of the conventional arms under review.

The following factors should be considered in this assessment:

- The nature of the conventional arms and related items;
- A thorough assessment of the stated end-user and the stated end-use;
- Methods agreed to verify the delivery and safe storage of the conventional arms and related items;
- Assessment of the risks of diversion.

Assessing the nature of the conventional arms

- Is there any reason to believe that this type of conventional arms or related items has previously been used by the intended end-user for serious violations of international human rights law or IHL?
- Are the items intended for internal security purposes? If so, is there reason to believe that the use of this type of arms or a similar type by law enforcement personnel may facilitate serious violations of international human rights law or IHL in the receiving country (for example, rape and other forms of torture or cruel, inhuman or degrading treatment or punishment, extra-judicial executions, recurrent acts of abusive force, arbitrary detentions or enforced disappearances)?
- Are the type, quality and quantity of the items requested compatible with the stated end-user's legitimate military, security or policing requirements?

Assessing the End-User

The risk assessment should not only entail examining the role or involvement of the intended end-user in past violations, and whether there is a record of the type of weaponry, munitions and related equipment being used for violations but also to determine the end user's propensity for abuse and violations of international human rights law or IHL and/or their capacity to use arms lawfully. The following questions should be considered when assessing the end-user:

- Who is the stated end-user and what is their capacity to manage and use the items in a lawful

manner? An assessment of the end-user should be conducted regardless of whether the recipient is a state or an authorized non-state entity (e.g. a private military or security company).

- What has been the end-user's role in the recipient state and is it lawful and legitimate?
- Has the end-user received adequate training in accordance with international human rights and humanitarian law standards?
- Does the end-user (e.g. the units of the internal security forces) operate under clear and accountable laws and lines of command and control?
- Can the recipient guarantee that it will be the actual lawful end-user of the equipment or other items and that adequate post-delivery controls are in place so that the items will not be diverted?
- Will the recipient accept to not transfer the equipment or other item to a third party without the express authorization of the supplier state?

End-user's capacity

- Does the stated end-user have a legitimate need for this weapon or other item?
- Does the end-user have the knowledge and capacity to manage and use the items in accordance with international human rights law standards (e.g. if the transfer of arms or ammunition/munitions is designated for use by the army are there adequate systems of accountability and training in international human rights law and IHL by those military or security personnel who will be using the arms or munitions)?
- Does the end-user have the capacity to verify the delivery, to manage the safe storage and distribution, and to properly maintain and deploy the items?

End user's international human rights law and IHL conduct

- Has the conduct of the stated end-user in upholding international human rights standards and IHL been the subject of substantial concern (such as the UN monitoring bodies, national human rights commissions or national, local or international human rights NGOs)?
- If yes, has the recipient country or end-user taken measures to prevent serious violations of international human rights law and IHL (including investigating and prosecuting those responsible for such violations)?
- Are there credible and reliable reports indicting the end-user's involvement in acts of internal repression or other serious human rights violations?
- Has the receiving government met its positive obligations to prevent the recurrence of such violations by this end user? Are there prompt, independent and impartial investigations into all serious violations of international humanitarian law or international human rights law, including unlawful killings, rape and other forms of torture and other cruel, inhuman or degrading treatment?
- Are those suspected of criminal responsibility brought to trial in fair trials before ordinary civilian courts and without recourse to the death penalty?
- Where the end-user is a non-State entity (such as a gun dealer), has the recipient State acted with due diligence to address any existing pattern of gender-based violence perpetrated or facilitated by conventional arms?
- How are records kept of firearm ownership and access, and how accessible are those records to the authorities when assessing risks of violence by known or suspected perpetrators of serious violations of international human rights law, including violence against women or violence against children?

End user's control over its arms and munitions

- Does the recipient state have an effective national control system in place for the use, storage and registration of arms and munitions?
- Does the stated end-user have adequate stockpile management capacity and security procedures in place, including for the disposal of surplus weapons and munitions (for example, adequate record-keeping, auditing of those records, safe and secure storage facilities in appropriate locations and an adequate transport and storage security plan)?
- Are thefts or leakages from stockpiles known to be a problem in the recipient state?
- Is illicit trafficking of arms or corrupt practices relating to arms a problem in the recipient state?
- Does the recipient maintain strict and effective control over its military and security equipment and related items and their further transfer?

STEP 2: MITIGATION MEASURES

Pursuant to Article 7(2), the exporting State Party must consider whether there are measures that could be undertaken to mitigate the risk of any serious violations of international human rights or humanitarian law, such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States.

Article 7(2) suggests confidence-building measures or jointly developed and agreed programmes by the exporting and importing States as possible measures.

Mitigation measures should have the aim of reducing the probability that identified risks would materialize. Mitigation measures can have a range of objectives depending on the nature of those risks including, for example, an increase in the level of accountability for the use of the weaponry and/or munitions, and an increase in the levels of compliance of the use of those items in a manner that is consistent with international human rights or humanitarian law.

Some mitigation measures that can assist in increasing accountability for the use of weaponry are:

- Enhancing the effectiveness of the systems in place for the use, storage and registration of weapons and ammunition by law enforcement officers, security forces and other security personnel;
- Enhancing the record keeping procedures of whom is authorized to carry, and use the weapons;
- Assisting and providing resources and capacity to help establish effective systems to secure the many stockpiles of weapons, munitions and related equipment. Such systems should include adequate record-keeping, auditing of those records, safe and secure storage facilities in appropriate locations, and an adequate transport and storage security plan;
- Ensuring that all small arms and light weapons are uniquely marked in compliance with the International Tracing Instrument (2005).

Some mitigation measures that can assist in increasing the levels of compliance with international human rights law and IHL include:

- Examining to what extent the relevant international human rights and IHL standards have been effectively integrated in doctrines, policy, manuals, instructions and training. Any international provision of military, security and police training from foreign governments must ensure that it is consistent with international human rights standards on the use of force and firearms and with obligations under IHL.

- Careful selection of relevant military, security and police personnel to undergo regular training and/or re-training programs, and also careful selection of training personnel and of relevant subjects for the curriculum.

- Training and assistance must go beyond simply describing military, security and police forces obligations under international law; there should be adequate time for regular rigorous practical training exercises for all personnel which reflect operational reality, and emphasize best practices that respect international human rights and humanitarian law standards.

- Robust monitoring of the conduct of those personnel who have received training should be followed up with continuous training to eradicate risks of mismanagement and misuse of weapons and munitions. All training should progressively cover all personnel responsible for handling arms.

Existing State practices also provide a number of examples of other possible mitigation measures:

- Requiring end use assurances on use and re-transfer;

- Requiring a valid import license as part of the export license application;

- In the case of small arms and light weapons, applying a “new for old” principle that as a condition of sale requires that the end-user destroys small arms that are to be replaced by the new consignment;⁴⁶

- Requiring a delivery verification certificate verifying that the goods arrived at the customs territory of the recipient State and, in the case of sensitive equipment, on site inspection of the storage and management of the items.

STEP 3: MAKING A DECISION: IS THERE AN OVERRIDING RISK?

Article 7(3) states that:

“If, after conducting this assessment and considering available mitigation measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences in paragraph 1, (including serious violations of international human rights law and IHL?) the exporting State Party shall not authorise the export.”

The concept of risk being “overriding” is a novelty in multilateral treaties. The usage of the term in the ATT can be seen as an effort by States to capture the complexity of arms export decision making processes and the need for States to weigh the perceived benefit of tangible peace and security against the potential risks of an arms export resulting in significant harm (including serious violations of international human rights law and IHL).

AT WHAT POINT DOES A RISK BECOME “OVERRIDING”?

Ultimately Article 7(3) requires a State Party to assess whether the export authorization under review will make a lawful contribution to peace and security. If this cannot be shown to be the case, and one or more of the identified potential negative consequences, including a serious violation of international human rights law or international humanitarian law, poses an “overriding” risk, then no authorization can be given.

The particular circumstances of the recipient State and the likely use of the arms and/or related items should be carefully considered. The analysis of “overriding risk” should be carried out by competent national authorities based on an objective and non-discriminatory consideration of all available evidence of the past and present circumstances in the recipient country regarding the proposed end-use and end-user.

In assessing whether there is an overriding risk the following should be considered:

- Clearly whether a proposed export will contribute to peace and security is dependent on the situation in the recipient State regarding the lawful use of the arms and/or related items. Levels of existing peace and security and capacity to use the items lawfully will vary from one State to the next. For example, peace and security in a State emerging from armed conflict and what is required to rebuild the levels of peace and security will differ from States with institutions including military, security and police forces that operate under the rule of law.
- Isolated incidents of violations of international human rights law are not necessarily indicative of a recipient state's attitude or commitment towards its obligations under this body of law. An isolated incident may not be a sufficient basis for denying an export. However, where there is evidence of patterns, or where there is evidence that the recipient has not taken appropriate steps to end systematic violations, ensure accountability for those violations and prevent their recurrence, the likelihood of overriding risk becomes greater.
- Determination of an overriding risk should be based on a judgment that is objectively informed through the systematic application of clear criteria set out in the treaty using reliable and credible evidence, and it should be a balanced finding based on a reasoned consideration of all the relevant facts.
- A thorough assessment of the possible positive and negative effects of the export must be completed. Such an assessment must weight the various risks in good faith, and consider realistically whether practical measures can reasonably be taken to sufficiently mitigate those various risks.
- Ultimately, for an export to be authorized legitimately in terms of the treaty, the exporting State is first required to demonstrate in a clear and identifiable way that the export would make a positive contribution to peace and security in lawful manner. The exporting state must also demonstrate that any potential negative consequences identified in the risk assessment that could result in serious violations of relevant international law will not be so grave and likely as to override that positive contribution.

APPENDIX A

There are ten core international human rights instruments:

- International Covenant on Civil and Political Rights (ICCPR);
- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Convention on the Elimination of all Forms of Discrimination against Women;
- Convention on the Rights of the Child;
- Convention on the Elimination of All Forms of Racial Discrimination;
- International Convention on the Protection of the Rights of all Migrant Workers and Member of Their Families;
- International Convention on the Rights of Persons with Disabilities;
- International Convention for the Protection of all Persons from Enforced Disappearances.

ENDNOTES

- 1 Article 5.5 on an effective and transparent national control system
- 2 Article 5.1 on general implementation
- 3 Article 2 (the UN Register of Conventional Arms includes battle tanks, armoured combat vehicles, large-calibre artillery systems, combat aircraft, attack helicopters, warships, missiles and missile launchers).
- 4 Article 3 on Ammunition/Munitions
- 5 Article 4 on Parts and Components
- 6 Article 7.5 on detailed export authorizations prior to export and Article 5 on General Implementation
- 7 Article 7.1 (a) and Article 7.3
- 8 Article 7 on Export and Export Assessment
- 9 Article 7.4
- 10 Article 11.2 on Diversion
- 11 Article 7.1, 7.2, 7.3 and 7.4, as well as Article 11.2
- 12 Article 7.5 and 7.7
- 13 Article 13 on Reporting
- 14 Article 16(3)
- 15 Article 17 on the Conference of States Parties
- 16 Article 20 on Amendments
- 17 Article 19 on Dispute Settlement
- 18 The ATT sets out obligations on exporters, importers, transit and trans-shipment States and brokers (see Articles 5, 6, 7, 8, 9 and 10). In the risk assessment a “importing State Party shall take measures to ensure that appropriate and relevant information is provided, upon request, pursuant to its national laws, to the exporting State Party, to assist the exporting State Party in conducting its national export assessment under Article 7” (Article 8(1)).
- 19 Article 7.1 (a) and Article 7.3
- 20 Article 7 on Export and Export Assessment
- 21 Article 5(1)
- 22 In particular the standards set out in the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the United Nations Code of Conduct for Law Enforcement Officials and the United Nations Standard Minimum Rules for the Treatment of Prisoners.
- 23 Article 51 of the UN Charter.
- 24 The Preamble states, “Recalling Article 26 of the Charter of the United Nations which seeks to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world’s human and economic resources.”
- 25 See also, Wassenaar Arrangement, Elements for Objective Analysis and Advice Concerning Potentially Destabilising Accumulations of Conventional Weapons.
- 26 Article 7(1) refers to ‘a serious violation of international human rights law’
- 27 Article 7(1)(b)(i). See ICRC document “Arms transfer decisions: Applying international humanitarian law criteria” on applying IHL to arms transfer decisions. This document will be published in early February 2015 and will be available on the ICRC website.
- 28 Common Article 1 to the four 1949 Geneva Conventions.
- 29 The International Court of Justice (ICJ) has stated that, “some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.” ICJ, “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory”, Advisory Opinion, 9 July 2004.
- 30 ICJ, “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory”, Advisory Opinion, 9 July 2004, paras 107-112.
- 31 UN CCPR Human Rights Committee, General Comment 31 on The Nature of the General Legal Obligation on the States Parties to the International Covenant on Civil and Political Rights, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 11.
- 32 New York, 18 December 1979; United Nations, Treaty Series, vol. 1249, p. 13. Entry into force 3 September 1981, in accordance with article 27(1).
- 33 General Recommendation No. 19 (11th session, 1992)
- 34 Ibid.
- 35 Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in Vienna, June 25, 1993.

- 36 UN General Assembly, 48th Session, February 1994, Declaration on the Elimination of Violence against Women (A/RES/48/104), Article 1.
- 37 Council of Europe, April 2011, Convention on preventing and combating violence against women and domestic violence. Entry into force 1 August 2014.
- 38 Commission on the Status of Women, 57th Session, March 2013, Elimination and prevention of all forms of violence against women and girls (E/CN.6/2013/11), Agreed Conclusions, para.10, March 18, 2013.
- 39 Commission on the Status of Women, 57th Session, March 2013, Elimination and prevention of all forms of violence against women and girls (E/CN.6/2013/11), Agreed Conclusions, March 18, 2013, para.11.
- 40 These include resolutions 1325 (2000), 1820 (2008), 1888 (2009), 1889 (2009), and 1960 (2010). United Nations Security Council, 6453rd Meeting, December 2010, Resolution 1960 (2010) (S/RES/1960 (2010)), 16 December 2010
- 41 New York, 20 November 1989 United Nations Treaty Series, vol. 1577, p. 3; entry into force 2 September 1990, in accordance with article 49
- 42 Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000. Entry into force 12 February 2002.
- 43 Member States have called for the inclusion of women's rights and the participation of women in these processes. The Women, Peace and Security agenda in the UN Security Council includes commitments calling for women's rights and engagement to be systematically addressed and enhanced in conflict prevention, conflict resolution and peace building. For instance, UN Security Council Resolution 1325 reaffirms the important role of women in the prevention and resolution of conflicts, peace negotiations, peace-building, peacekeeping, humanitarian response and in post-conflict reconstruction and stresses the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security. It also urges all actors to increase the participation of women and incorporate gender perspectives in all United Nations peace and security efforts. The General Assembly, has on numerous occasions expressed its concerns about the pervasiveness of violence against women in all its different forms and manifestations worldwide, noting that such violence seriously impairs or denies women's ability to exercise their fundamental human rights and freedoms.
- 44 Article 3 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR)
- 45 Further, in using the words "in making this assessment" it is clear that "this assessment" refers to the Article 7(1) assessment.
- 46 For example, Germany states this is a practice applicable to all third countries (ie countries that are not NATO or EU member States or NATO-equivalent countries)

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